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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

Estate of KAROLINE E. GUND, Deceased,
W. R. SPRINGATE, Executor, and
IRENE DORNER, Executrix,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 440

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

The Estate of Karoline E. Gund, deceased; W. R. Springate, Executor, and Irene Dorner, Executrix, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered in the above case on June 27, 1940 (R. 41-47), affirming the judgment of the United States Board of Tax Appeals, 37 B. T. A. 1335 (R. 31-33).

QUESTION PRESENTED.

The petitioner bequeathed the remainder of her estate to a cemetery association organized and operated solely to acquire and perpetually care for the cemetery, to be held by it as a fund for the maintenance, care, additions and betterments to said cemetery. Is the bequest for a public, religious or charitable use within the meaning of Section 303 (a) (3) of the Revenue Act of 1926, as amended (Appendix, p. 13), and deductible thereunder?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The evidence in the case, submitted in written stipulation (R. 14-30), may be summarized as follows:

Karoline E. Gund died testate August 21, 1934 (R. 14), and bequeathed the residue of her estate in trust, the income to be paid to Irene Dorner for life. Thereafter, the corpus to Oak Grove Cemetery Association (called in the will "La Crosse Cemetery Company") to be held as a fund for the maintenance, care, additions and betterments to the cemetery as provided in paragraph 6 of her will (R. 18), which reads as follows:

> "6. All the rest, residue, and remainder of my property, both real and personal, of every kind and description whatsoever and wheresoever situated, I give, devise, and bequeath to my Trustees hereinafter named, in trust, however, for the uses and purposes following:
>
> "(a) To hold such securities and property as remains and pay the entire net income therefrom to Miss Irene Dorner, in such amounts and at such times as she may direct.
>
> "(b) At the death of Miss Irene Dorner, I give, devise and bequeath the property and securities held

under Paragraph 6, Section 'A', to the La Crosse Cemetery Company, La Crosse, Wisconsin, to be held by said cemetery company as a fund for the maintenance, care, additions and betterments to said cemetery."

The value of the residue, after deducting the life estate, was $101,105.68 (R. 15). The Oak Grove Cemetery Association was incorporated in perpetuity on December 2, 1872 under Chapter 67 of the Wisconsin Statutes of 1858, which, as amended, is now found in Chapter 157 of the Wisconsin Statutes of 1933. It has no stockholders. It is managed by trustees and officers. The trustees elect the officers and the trustees are elected by the owners of the burial rights. It owns a cemetery of about 103 acres in the City of La Crosse, Wisconsin, which is held and used exclusively for burial purposes. It sells burial rights to the public generally. The county, city, churches and other organizations own plots in the cemetery for the burial of their respective indigent subjects, and the county also gives free burial rights to United States soldiers. Its entire income is restricted to and used exclusively for the acquisition, operation, maintenance and care of the cemetery and any excess funds must be set aside in a perpetual care fund. It collects from owners of burial rights an annual charge of 1 cent per foot towards defraying the cost of maintenance and upkeep. The decedent and her husband are buried in a private mausoleum erected in said cemetery with private funds (R. 15-16).

REASONS FOR GRANTING THE WRIT.

The decision of the court below is contrary to Section 303 (a) (3) of the Revenue Act of 1926, as amended. The decision of the court below, holding that the bequest was not to a charitable use on the grounds the cemetery association provided no free burial space and charged not less than the fair value for burial rights and upkeep, is con-

trary to the plain provisions of the above section of the Revenue Act, providing for the deduction of bequests to a trustee or trustees for charitable purposes.

The decision of the court below is in conflict with the decision of this Court in Young Men's Christion Association v. Davis, 264 U. S. 47, and the decision of the Seventh Circuit in Levey v. Smith, 103 Fed. (2d) 643. The decision of the court below, sustaining the disallowance of the deduction of the bequest on the basis of the scope and nature of the business of the legatee (the cemetery association), instead of the use of the legacy as willed by the testator, is in conflict with the decisions of this Court in Young Men's Christian Association v. Davis, supra, and Levey v. Smith, supra (pp. 9-10, infra), holding that the right to the deduction is governed by the use of the bequest specified in the will of the testator.

The decision of the court below is in conflict with the decisions of this Court in Helvering v. Bliss, 293 U. S. 144, and U. S. v. Pleasants, 305 U. S. 357. Under Section 303 (a) (3) of the Revenue Act of 1926, as amended, the bequest is exempted on the grounds it is a gift for a public, religious or charitable use. Young Men's Christian Association v. Davis, 264 U. S. 47. The court below, in following Schuster v. Nichols, 20 Fed. (2d) 179, holding that the word "charitable" should be given a narrow meaning under the rule of strict construction, is contrary to and in conflict with the decisions of this court in Helvering v. Bliss, supra, and U. S. v. Pleasants, supra, holding that exemptions from tax were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed.

The decision of the court below is contrary to the opinion of the General Counsel of the Bureau of Internal Revenue, G. C. M. 21610, Cumulative Internal Revenue Bulletin, 1939-2, page 103. The disallowance of the deduction of the

bequest on the grounds the cemetery association was not organized and operated for exclusively charitable purposes is contrary to the above opinions of the General Counsel of the Bureau of Internal Revenue, holding that the use specified in the will or other binding instrument governed and that the trustee or legatee did not have to be organized and operated for exclusively charitable purposes.

The decision of the court below is contrary to Ruling 1256, Internal Revenue Cumulative Bulletin, I-1, page 189, holding that a gift to a cemetery association organized solely to lease, operate and care for a cemetery owned by a city was for the use of a political subdivision of a state for a public purpose.

The decision of the court below is contrary to Beattie and Ritchie v. Kurtz, 2 Pet. 566; City of Cincinnati v. Lessee of White, 6 Pet. 431, and Hopkins v. Grimshaw, 165 U. S. 342, holding that the gift of land for cemetery purposes is a dedication thereof to a public, pious and charitable use.

The decision of the court below is contrary to public policy. The exemption from tax of bequests for altruistic purposes is from motives of public policy and must be liberally construed (Helvering v. Bliss, supra; U. S. v. Pleasants, supra), and are encouraged by both the courts and Congress (Young Men's Christian Association v. Davis, supra; Levey v. Smith, supra).

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

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